IN THE

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT

No. 5941.

WILLIAM ELMER BROWN, JR.,

Defendant-Appellant,

v.

EDWARD J. O'KEEFE, Receiver of the Union National Bank of Atlantic City, N. J.,

Plaintiff-Appellee.

Petition for Rehearing.

Appeal From the District Court of the United States For the District of New Jersey.

WILLIAM B. HUNTER,
BOURGEOIS & COULOMB,
Counsel for Plaintiff-Appellee-Petitioner.

International, 236 Chestnut St., Philadelphia

IN THE

United States Circuit Court of Appeals,

FOR THE THIRD CIRCUIT.

No. 5941.

WILLIAM ELMER BROWN, JR.,
Defendant-Appellant,

v.

EDWARD J. O'KEEFE, RECEIVER OF THE UNION NATIONAL BANK OF ATLANTIC CITY, N. J.,
Plaintiff-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

PETITION FOR REHEARING.

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Third Circuit:

Now on this day comes EDWARD J. O'KEEFE, RECEIVER OF THE UNION NATIONAL BANK OF ATLANTIC CITY, N. J., plaintiff-appellee in the above case, and files this, his petition for a rehearing, and for grounds thereof alleges the following:

1. In the findings contained in the opinion filed herein on January 24, 1936, as follows:

> "Moreover, the fact is that on Brown's bankruptcy the ownership of this stock, by act of law, passed to his creditors and was vested in his trus-

> tee. Brown could not sell, control, assert or exercise any act of ownership over it. *No doubt, the trustee could, by leave of court, have declined to accept the stock and surrendered it to Brown. But he neither did so nor applied to the court for leave so to do.* It follows, therefore, that Brown, having by force of law been deprived of all interest in, or ownership of, the stock and ownership never having revested in him, the court was in error in holding he was the owner when the stock was assessed. Its judgment is, therefore, reversed." (Italics ours.)

this court misapprehended, misconceived and overlooked the evidence in the case for that on the argument of the motion for a summary judgment before the United States District Court for the District of New Jersey, (a) it was proved and admitted that Clarence E. Knauer, Esq., the Trustee in Bankruptcy of the appellant, William Elmer Brown, Jr., received into his possession, as said Trustee, the ten shares of the capital stock of the Union National Bank, upon which said assessment was subsequently levied, which said stock was then registered in the name of the said appellant, William Elmer Brown, Jr.; that after investigation, said Trustee concluded there was no equity in said ten shares of bank stock, and that said stock would be burdensome to the bankrupt estate which he was administering; that accordingly said Trustee prepared a petition addressed to the Referee in Bankruptcy praying authority to abandon all title to and disclaim all interest of the bankrupt in said ten shares of stock; that pursuant to the prayer of said petition, the said Referee did, by order bearing date of the twenty-seventh day of October, 1933, direct said Trustee to abandon all title to and disclaim all interest of said bankrupt in said ten shares of stock. (All of which appeared in the affidavit of the said Clarence E. Knauer, Trustee in Bankruptcy of the appellant, Wil-

liam Elmer Brown, Jr., appearing on page 31 of the record on appeal filed in this cause), and (b) it was further proved and admitted that pursuant to the prayer of the said petition of the said Trustee in Bankruptcy, the said Referee in Bankruptcy, by order bearing date of the twenty-seventh day of October, 1933, did order and direct as follows:

> "Clarence E. Knauer, Trustee of the above-named bankrupt, having filed his petition, requesting leave to abandon certain property of the bankrupt, on the ground that there is no equity in the said property for the unsecured creditors and the same is therefore burdensome to the bankrupt estate, and it appearing that the prayer of the petition should be granted;
>
> It is, therefore, on this twenty-seventh day of October, A. D. 1933, Ordered that the said Clarence E. Knauer, Trustee of the said William Elmer Brown, Jr., bankrupt, be and he is hereby authorized and directed to abandon all title to and to disclaim all the interest of the bankrupt in the following:
>
> Ten shares of Union National Bank stock.
>
> ROBERT E. STEEDLE,
> *Referee in Bankruptcy.*"

Said order appears on page 32 of the record on appeal filed in this cause.

2. The said affidavit and order heretofore referred to in paragraph 1 of this petition were annexed to plaintiff-appellee's motion to strike the answer filed by the defendant-appellant and for the entry of a summary judgment, because the defendant-appellant had set up as the "first Defense" in the answer filed by him the following (Record on Appeal, pages 6 and 7):

> "On April 21, 1933, defendant was adjudicated a bankrupt by the United States District Court for

the District of New Jersey and all right, title and interest of the defendant in and to the said ten shares of stock by act of law was immediately transferred to and vested in the trustee duly appointed for said defendant bankrupt, whereupon the defendant lost all dominion and control over the said shares of stock.

Said trustee has not disclaimed title to the said ten shares of stock to defendant.

At the date of the assessment levied as aforesaid defendant in law and in fact was not the legal or equitable owner of said ten shares of the stock of said Union National Bank of Atlantic City, N. J., upon which said assessment was levied."

Upon the argument of plaintiff-appellee's motion for a summary judgment before the United States District Court for the District of New Jersey, defendant-appellant specifically consented to the striking of said first defense, and the said United States District Court for the District of New Jersey based its findings in accordance with the statement of the defendant-appellant that said first defense was stricken, as appears from the memorandum of the Honorable John Boyd Avis, District Court Judge, in this cause, in which he said (Record on Appeal, page 48):

"The first defense states that defendant was adjudicated a bankrupt on April 21, 1933, and that by reason thereof from that time on he was not the legal or equitable owner of said shares of stock, and consequently is not liable for the assessment. It is not necessary to discuss this defense as defendant in his brief consents that it be stricken."

3. In the brief filed by the defendant-appellant in this court, he said, at page 2:

"We are not concerned here with the first defense because by consent that has been stricken."

In the brief filed on behalf of the plaintiff-appellee, it was stated, at page 3:

> "Defendant consented to the striking of the first defense, so it is of no moment on this appeal."

4. It was, therefore, conclusively proved and admitted that the Trustee in Bankruptcy of the defendant-appellant did, in fact, decline to accept the bank stock upon which said assessment was subsequently levied and that said Trustee had, in fact, by leave of Court, surrendered said bank stock to the said defendant-appellant, William Elmer Brown, Jr. It follows, therefore, that the said defendant-appellant, William Elmer Brown, Jr., was not deprived of all interest in or ownership of said bank stock, but as a matter of fact, the said defendant-appellant, William Elmer Brown, Jr., was the owner of said bank stock prior to and at the time on which the assessment thereon was levied by the Comptroller of the Currency of the United States of America, and is, therefore, liable in law for the payment of said assessment. All of which is contrary to the findings of this Honorable Court on this appeal.

Petitioner, therefore, humbly prays of this Honorable Court that a rehearing of said cause be allowed.

Respectfully submitted,

BOURGEOIS & COULOMB,
Counsel for Plaintiff-Appellee-Petitioner.

Dated January 30, 1936.

STATE OF NEW JERSEY,
COUNTY OF ATLANTIC, } *ss.:*

WILLIAM B. HUNTER, of full age, being duly sworn according to law, upon his oath, deposes and says:

1. I am associated with the firm of Bourgeois & Coulomb, counsel for plaintiff-appellee in the above-entitled cause, and am the person actually entrusted with the management and conduct of said cause.

2. I hereby certify that in my opinion, as counsel herein, the grounds of the foregoing petition are well founded and I believe the foregoing petition for a rehearing in said cause to be well founded in law and that the same is proper to be presented and filed.

WILLIAM B. HUNTER.

Sworn and subscribed to before me this thirtieth day of January, 1936.

MADELINE M. NEWELL,
(Seal) *Notary Public of New Jersey.*

Service of a copy of the within petition for rehearing is acknowledged this thirtieth day of January, 1936.

BOLTE & TRIPICIAN,
Counsel for Defendant-Appellant.

[fol. 75] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5941

WILLIAM ELMER BROWN, JR., Defendant-Appellant,

v.

EDWARD J. O'KEEFE, Receiver of the Union National Bank of Atlantic City, N. J., Plaintiff-Appellee

SUR PETITION FOR REHEARING

And Now, to wit, March 18, 1936, after due consideration, the petition for rehearing in the above-entitled case is hereby granted and argument restricted to the question whether when the trustee disclaimed title to the bank stock which the law vested in him, he can re-confer title in the bankrupt without some affirmative action on the latter's part.

Philadelphia, March 18, 1936.

Per Curiam, Buffington, Circuit Judge.

Endorsements: Order Granting Petition for Rehearing, etc., Received & Filed March 18, 1936. William P. Rowland, Clerk.

[fol. 76] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5941

WILLIAM ELMER BROWN, JR., Appellant,

vs.

EDWARD J. O'KEEFE, Receiver of the Union National Bank of Atlantic City, N. J., Appellee

And afterwards, to wit, the 9th day of April, 1936, come the parties aforesaid by their counsel aforesaid, and this case being called for reargument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Cir-

cuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 24th day of September, 1936, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 77] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5941

WILLIAM ELMER BROWN, JR., Defendant-Appellant,

v.

EDWARD J. O'KEEFE, Receiver of the Union National Bank of Atlantic City, N. J., Plaintiff-Appellee

Appeal from the District Court of the United States for the District of New Jersey

OPINION ON REHEARING—Filed September 24, 1936

Before Buffington, Davis and Thompson, Circuit Judges

BUFFINGTON, J.:

In the court below the receiver of a national bank brought suit against defendant to recover a hundred per cent assessment made by the Comptroller on stock of such bank standing in defendant's name on the books of the bank. The first defense of defendant was that he was not the owner of the stock for reasons stated, viz:

[fol. 78] "1. On April 21, 1933, defendant was adjudicated a bankrupt by the United States District Court for the District of New Jersey and all right, title and interest of the defendant in and to the said ten shares of stock by act of law was immediately transferred to and vested in the trustee duly appointed for said defendant bankrupt, whereupon the defendant lost all dominion and control over the said shares of stock.

2. Said trustee has not disclaimed title to the said ten shares of stock to defendant.

3. At the date of the assessment levied as aforesaid defendant in law and in fact was not the legal or equitable

owner of said ten shares of the stock of said Union National Bank of Atlantic City, N. J., upon which said assessment was levied.

4. The title to said stock was transferred to and vested in the said trustee by act of law more than sixty days prior to the appointment of the said receiver."

His other defense was that he was relieved of liability by his discharge in bankruptcy.

The case went to trial before the Judge below on the pleadings. Whereupon, as the Judge states in his opinion,

"In the complaint it is alleged that defendant at the time the assessment was levied owned ten shares of the capital stock of the bank, of a par value of $100 per share. The assessment, made on January 8, 1934, was 100 per cent. The defendant's alleged liability is $1000. The answer admits all of the material allegations of the complaint, but sets up thirteen separate defenses as a bar to the action. The first defense states that defendant was adjudicated a bankrupt on April 21, 1933, and that by reason thereof from that time on he was not the legal or equitable owner of said shares of stock, and consequently is not liable for the assessment. It is not necessary to discuss this defense as defendant in his brief consents that it be stricken."

[fol. 79] Defendant's further defense was that his discharge in bankruptcy was a bar and defense to the suit. It further appeared the trustee in bankruptcy had declined to accept the stock. Thereupon the Judge in an exhaustive and, to us, satisfactory opinion held that the statutory liability of the defendant to future assessment was not a provable claim and consequently was not discharged. In that respect the court said:

"I am convinced that, under the facts in the instant case, the doctrine of the McClaine case is controlling; that the obligation of the defendant did not arise out of contract, express or implied, but was in the nature of a statutory liability, and that the debt arising therefrom became due and owing at the time the assessment was made. * * *

Under all of the circumstances of the instant case, I am satisfied that the ownership of the stock was in the defendant at the time of assessment; that the obligation was not a provable claim against the bankrupt estate at the time of

adjudication; that the discharge of defendant as a bankrupt did not relieve him from the assessment on his stock made thereafter."

So holding, the judgment below is affirmed and the opinion filed January 24, 1936 is withdrawn from the files and this opinion substituted therefor.

A true Copy. Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 80] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1935

No. 5941

WILLIAM ELMER BROWN, JR., Defendant-Appellant,

vs.

EDWARD J. O'KEEFE, Receiver of the Union National Bank of Atlantic City, N. J., Plaintiff-Appellee

On Appeal from the District Court of the United States, for the District of New Jersey

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, September 24, 1936.

Per Curiam, Buffington, Circuit Judge.

Endorsements: Order Affirming Judgment, Received & Filed Sept. 24, 1936. Wm. P. Rowland, Clerk.

[fol. 81] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify

the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this Court in the case of William Elmer Brown, Jr., Defendant-Appellant, vs. Edward J. O'Keefe, Receiver of the Union National Bank of Atlantic City, N. J., Appellee, No. 5941, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 5th day of October, in the year of our Lord one thousand nine hundred and thirty-six, and of the Independence of the United States the one hundred and sixty-first.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal United States Circuit Court of Appeals, Third Circuit.)

[fol. 82] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 18, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.